Supreme Court, U. S.
FILED
JUL 31 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-895

VIRGINIA STATE BOARD OF PHARMACY, *et al.*,
Appellants,

v.

VIRGINIA CITIZENS CONSUMER
COUNCIL, INC., *et al.*,
Appellees.

Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF OF APPELLEES

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TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	10
ARGUMENT	13
I. COMMUNICATION OF INFORMATION CONCERNING THE PRICE OF PRESCRIPTION DRUGS TO CONSUMERS IS PROTECTED BY THE FIRST AMENDMENT	13
A. The First Amendment Applies To Drug Price Information	14
B. Appellees Have A Right To Receive Drug Price Information	18
II. APPELLEES' SUBSTANTIAL INTEREST IN OBTAINING DRUG PRICE INFORMATION GREATLY OUTWEIGHS ANY INTEREST THAT THE STATE MAY HAVE IN SUPPRESSING THAT INFORMATION	22
A. Appellees And All Other Consumers Have A Significant Need For Drug Price Information	25

Page

B. The State Of Virginia Has No Legitimate Interest In Prohibiting The Dissemination Of Drug Price Information 27

1. The Professional Nature Of Pharmacy Does Not Justify The Statute Under Review 27

2. Monitoring Does Not Justify The Statute Under Review 32

C. There Is No Other Justification For The Statute Under Review 35

CONCLUSION 39

TABLE OF AUTHORITIES

Cases:

Associated Students for the University of California at Riverside v. Attorney General, 368 F.Supp. 11 (C.D.Cal. 1973) (three-judge court) 17

Atlanta Coop. News Project v. U.S. Postal Service, 350 F.Supp. 234 (N.D.Ga. 1972) (three-judge court) 18

Banzhaf v. F.C.C., 405 F.2d 1082 (D.C. Cir. 1968), *cert. den. sub nom., Tobacco Institute, Inc. v. F.C.C.*, 396 U.S. 842 (1969) 37

Page

Bigelow v. Virginia, ___ U.S. ___, 43 U.S.L.W. 4734 (June 16, 1975) . .10, 14, 15, 16, 18, 21, 23-24, 30

Brandenburg v. Ohio, 395 U.S. 444 (1969) 18

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 11, 22

Capital Broadcasting Co. v. Acting Attorney General, 333 F.Supp. 582 (D.D.C. 1971) (three-judge court), *aff'd*, 405 U.S. 1000 (1972) 37

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 18

Dun & Bradstreet v. Grove, 404 U.S. 898 (1971) 17

Dunn v. Blumstein, 405 U.S. 330 (1972) 11, 22

Erznonik v. City of Jacksonville, ___ U.S. ___, 43 U.S.L.W. 4809 (June 23, 1975) 31

Florida Board of Pharmacy v. Webb's City, Inc., 219 So.2d 681 (Fla. 1969) 34

F.T.C. v. Proctor & Gamble Co., 388 U.S. 568 (1967) 17

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 18

Ginzburg v. United States, 383 U.S. 463 (1966) 15

Page

Goldfarb v. Virginia State Bar,
___ U.S. ___, 43 U.S.L.W. 4723
(June 16, 1975) 29

Hiett v. United States,
415 F.2d 664 (5th Cir. 1969),
cert. denied, 397 U.S. 936 (1970) 17

Kleindienst v. Mandel,
408 U.S. 753 (1972) 10, 19, 20

Lamont v. Postmaster General,
381 U.S. 301 (1965) 10, 19, 22

Martin v. Struthers,
319 U.S. 141 (1973) 10-11, 19

Maryland Board of Pharmacy v.
Sav-A-Lot, Inc.,
270 Md. 103,
311 A.2d 242 (1973) 34

McDonald v. Board of Election
Commissioners of Chicago,
394 U.S. 802 (1969) 24

Miami Herald Publishing Co. v. Tornillo,
418 U.S. 241 (1974) 37

Miller v. California,
413 U.S. 15 (1973) 18

Murdock v. Pennsylvania,
319 U.S. 105 (1943) 15

N.A.A.C.P. v. Button,
371 U.S. 415 (1963) 11, 21, 22, 28

National Broadcasting Co. v.
United States,
319 U.S. 190 (1943) 37

Page

New Jersey State Lottery Comm. v.
United States,
491 F.2d 219 (3d Cir. 1974)
(*en banc*), *remanded to consider*
mootness, ___ U.S. ___, 95 S.Ct.
941 (1975), *prior judgment aff'd*,
___ F.2d ___, No. 72-1878
(3d Cir. July 14, 1975) (*en banc*) 38

New York State Broadcasters Ass'n.
v. United States,
414 F.2d 990 (2d Cir. 1969),
cert. denied, 396 U.S. 1061 (1970) 37, 38

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 14, 15

North Dakota Pharmacy Board
v. Snyder's Stores, Inc.,
414 U.S. 156 (1973) 24

P.A.M. News Corp. v. Butz,
514 F.2d 272 (D.C. Cir. 1975) 17

Patterson Drug Co. v. Kingery,
305 F.Supp. 821 (W.D.Va. 1969)
(three-judge court) 3, 7, 11, 19,
26-27, 33

Pennsylvania Board of Pharmacy
v. Pastor,
441 Pa. 186,
272 A.2d 487 (1971) 33, 34

Pittsburgh Press v. The Pittsburgh
Commission on Human Relations,
413 U.S. 376 (1973) 14, 36

Population Services International v. Wilson,
___ F.Supp. ___, No. 74 Civ. 1572
(SDNY July 2, 1975)(three-judge court) 18

Page

Red Lion Broadcasting Co. v. F.C.C.,
395 U.S. 367 (1969) 37

Roth v. United States,
354 U.S. 476 (1957) 18

Semler v. Oregon State Board of Dental Examiners,
294 U.S. 608 (1935) 24

Sheldon v. Tucker,
364 U.S. 479 (1960) 11, 22

Smith v. California,
361 U.S. 147 (1959) 15

Stadnik v. Shell's City, Inc.,
140 So.2d 871 (Fla. 1962) 34

Stanley v. Georgia,
394 U.S. 557 (1969) 10, 19

Supermarkets Gen. Corp. v. Sills,
98 N.J. Super. 326,
225 A.2d 728 (1966) 34

Talley v. California,
362 U.S. 60 (1960) 11, 22

Terry v. California State Board of Pharmacy,
___ F.Supp. ___,
No. C-74-1091 RFP (SJ)
(N.D.Cal. May 12, 1975)
(three-judge court) 7, 17, 20

Thomas v. Collins,
323 U.S. 516 (1945) 15

Thornhill v. Alabama,
310 U.S. 88 (1940) 17

Page

United States v. Hunter,
459 F.2d 205 (4th Cir.),
cert. denied, 409 U.S. 934 (1972) 36

Valentine v. Chrestensen,
316 U.S. 52 (1942) 10, 14, 15

Weinberger v. Salfi,
___ U.S. ___,
43 U.S.L.W. 4985 (June 26, 1975) 35

Weinberger v. Wiesenfeld,
___ U.S. ___,
95 S.Ct. 1225 (1975) 35

Williamson v. Lee Optical of Oklahoma, Inc.,
348 U.S. 483 (1955) 24, 38

Constitutional Provisions and Statutes:

United States Constitution

First Amendment . . . . . *passim*
Fourteenth Amendment . . . . . *passim*

Code of Virginia

Section 54-524.22:1 (1974) 2, 8
Section 54-524.35(2) (1974) 2, 30
Section 54-524.35(3) (1974). . . . . 2-3, *passim*
Section 59.1-44 (1975 Supp.) 30

Economic Stabilization Act, 12 U.S.C.
§1904, note. (1975 Supp.) 29-30

Page

Other Authorities:

Federal Trade Commission Proposed Disclosure Regulations Concerning Retail Prices For Prescription Drugs, 40 *Fed. Reg.* (June 4, 1975) 6

Research Paper and Policy Statement of the United States Department of Justice Regarding State Restrictions on the Advertising of Retail Prescription Drugs 5-6, 25

Staff Report on Prescription Drug Price Disclosures to the Federal Trade Commission, Jan. 28, 1975 6

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Appeal from the United States District Court for the Eastern District of Virginia

BRIEF OF APPELLEES

QUESTION PRESENTED

Can the State of Virginia constitutionally prohibit the dissemination of drug price information and thereby deny consumers the facts that they need to make informed decisions about where to purchase the drugs that their doctors prescribe for them?

STATUTES INVOLVED

This case involves the constitutional validity of Section 54-524.35(3) of the Code of Virginia (1974). The relevant statutes are set out below.

Section 54-524.22:1 of the Code of Virginia provides in pertinent part:

> The Board of Pharmacy may refuse to issue, revoke, suspend, refuse to renew any license, permit, or registration and/or impose a civil monetary penalty provided for in §54-524.107 or deny any application if it finds that:
>
> * * *
>
> (c) He has been guilty of unprofessional conduct as prescribed in §54-524.35;

Section 54-524.35 of the Code of Virginia provides in pertinent part:

> Any pharmacist shall be considered guilty of unprofessional conduct who
>
> * * *
>
> (2) issues, publishes, broadcasts by radio, or otherwise, or distributes or uses in any way whatsoever advertising matter in which statements are made about his professional service which have a tendency to deceive or defraud the public, contrary to the public health and welfare; or
>
> (3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription.

STATEMENT OF THE CASE

Section 54-524.35(3) of the Code of Virginia prohibits pharmacists from publishing, advertising, or promoting, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for the sale of prescription drugs. As a result of this statutory provision, there was no publication or advertising of prescription drug prices in Virginia, before the court below enjoined enforcement of the statute, and it was difficult for plaintiffs-appellees and all other Virginia consumers to obtain comparative price information about the prescription drugs that their doctors advised them to take. (Stip. 23, 25, 26 & 28; App. 14-16)[1]

Dissemination of prescription drug price information had been illegal in Virginia since 1968. Under the guise of preventing unprofessional conduct, the Virginia Pharmaceutical Association actively lobbied against drug price disclosure in order to insulate pharmacists from price competition by discount pharmacy chains who were willing to sell prescription drugs at lower prices.[2] The adverse impact that the Virginia statute had on consumers is substantial. Not only did the statute foster an unjustifiable inflation of prescription drug prices, but it deprived consumers of the very

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[1] "Stip." refers to designated paragraphs of the parties' Stipulation of Facts. "App." refers to designated pages of the Appendix.

[2] *See Patterson Drug Co. v. Kingery*, 305 F.Supp. 821, 825 (W.D.Va. 1968) (three-judge court).

price information that they needed to protect themselves from the high cost of prescription drugs. Although each of us, at one time or another, must use prescription drugs, consumers in Virginia received more price information about dog food and hair spray than about drugs which a doctor may have prescribed to save their lives.

The detrimental effect that section 54-524.35(3) of the Virginia Code had on competition is striking. Retail prices for identical prescription drugs varied considerably, even within one geographic area of the State. In Northern Virginia, for example, the price of 40 tetracycline tablets, a standard prescription quantity, could cost as little as $1.68 or as much as $3.90 – a price difference of 132% – depending upon which store the drug was purchased in. In Richmond, the price of 40 Achromycin tables varied from $2.59 to $6.00, a 140% price difference, and in the Newport News-Hampton, Virginia peninsula area, the price of a frequently prescribed amount of tetracycline varied from $1.20 to $9.00, or 650%.[3] In the same geographic areas, prices of non-prescription drugs, for which advertising is both permitted and practiced, do not even approach this tremendous degree of variation. (Stip. 21; App. 13-14).

There is no doubt that the wide variations in Virginia prescription drug prices were caused by the statutory prohibition on drug price advertising. The absence of advertising resulted in a lack of competition, causing excessively high prescription drug prices.[4] The United States Depart-

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[3] These dramatic price variations, as well as other examples of vast price differences for identical prescription drugs are included in paragraph 22 of the Stipulation. (App. 14).

[4] *See* testimony of Myron D. Winkelman, paragraphs 6-8 (App. 50-51).

ment of Justice, as the executive agency responsible for enforcement of the antitrust laws, has urged the elimination of such statutes precisely because of their adverse impact on competition. After citing several studies which found broad price differentials in areas where advertising was prohibited, including an American Medical Association survey showing 1200% price variations in Chicago for identical drugs, a Justice Department research paper and policy statement concluded:

> Competition is our basic national policy. It has proven to be the most effective spur to business efficiency, innovation, and low prices. Prohibitions on drug advertising represent departures from this national economic policy . . . .
>
> The Department of Justice believes that the major effect of legislation or regulations prohibiting price advertising of prescription drugs is to reduce retailer incentives to engage in price competition with resulting higher costs to the public . . . . It is the Department's view that such a premise [the belief that advertising of prescription drugs will endanger the public health] is largely erroneous and that, to the extent that public health dangers might pose problems, that can be met by methods which stop short of the absolute prohibition of price advertising . . . .
>
> Accordingly, it is the Department's view that existing state legislation or regulations which prohibit or restrict price advertising of prescription drugs may well be adverse to the public interest. Since such restrictions appear to be unnecessary to protection of the public and result in unjusti-

fiable expenditures by consumers, the Department feels they should be eliminated. (App. 22, 23 & 27).

The staff of the Federal Trade Commission has recently taken a similar position. On June 4, 1975, the Commission published and solicited comments on a proposed trade regulation that would eliminate state prohibitions on prescription drug advertising because of the adverse economic impact that such prohibitions have on consumers.[5] Remedial action by the Federal Trade Commission is still in its germinal stages, and it is not clear that the Commission has the authority to overrule state prohibitory statutes. Nevertheless, the proposed regulations further evidence a recognition by the federal government of the need to eliminate anticompetitive legislation such as the statute here at issue.

Not only has the Virginia statute caused unjustified drug price increases, but it has denied consumers the only means they have of protecting themselves from exploitation by the Virginia pharmacists who are immune from competition. Few consumers would pay $9.00 for tetracycline when they could purchase it at another pharmacy in the same neighborhood for $1.20. (*See* Stip. 22(c)(1); App. 14). However, many consumers did not even know about this price difference, and even if they did, it would have been difficult for them to shop for the best price because comparative price

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[5] The proposed regulation is published at 40 *Fed. Reg.* 24031. Presently, only sixteen states and the District of Columbia place no restrictions on drug price advertising. The remaining 34 states regulate the dissemination of drug price information through various combinations of statutory and regulatory prohibitions. *See* Staff Report on Prescription Drug Price Disclosures, submitted to the Federal Trade Commission on January 28, 1975, pp. 17-18.

information was so difficult to obtain. The Virginia statute clearly prohibits dissemination of price information in newspapers or other media enabling easy consumer access. Many pharmacists, however, believe that the Virginia statute also prohibits them from disclosing prescription drug prices over the telephone. (Stip. 25; App. 15). This means that often consumers could shop intelligently for drugs only by walking from store to store and asking what the price of a given drug was. Many consumers, therefore, did not attempt price comparisons because of the great inconvenience involved, while others, such as the aged and the infirm, are physically unable to engage in door-to-door pricing. Even where telephone inquiries were answered, the cost of a series of phone calls could be significant for those on small fixed incomes.

Many consumers were forced to tighten their belts and to do without other items because of the high prices that they had to pay for prescription drugs in Virginia. The Virginia statute, however, hit hardest at the poor, and at senior citizens who are frequently on fixed incomes, yet have four times the per capita expenditure on prescription drugs that individuals under age 65 do.[6] Also hard hit were those like appellee Lynn B. Jordan who suffer from conditions or diseases that require use of prescription drugs on a daily maintenance basis. For these consumers, every dollar spent on prescription drugs is a dollar which is unavailable for other necessities. For them the information concealed by the Virginia statute is not only helpful, but essential.

Section 54-524.35(3) of the Virginia Code had a profound, adverse economic impact on appellees. Because of

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[6] *See Terry v. California State Board of Pharmacy*, ___F.Supp.___, No. C-74-1091 RFP (SJ), slip op. at 4 (N.D. Cal. May 12, 1975)(three-judge court).

this statute, appellees and the individual consumers they represent, were at the economic mercy of pharmacists in Virginia who were free from the therapeutic effects of competition. Not only were consumers required to pay high prescription drug prices, but they were denied essential information which they have a fundamental right to receive. Accordingly, on July 11, 1973, this action was commenced in order to remove the statutory bar that prevented appellees from obtaining access to this vital price information.

Plaintiff-appellee Virginia Citizens Consumer Council, Inc. is a non-profit, non-partisan, volunteer organization incorporated in Virginia, with a membership of approximately 150,000, many of whom are users of prescription drugs. Plaintiff-appellee Virginia State AFL-CIO is an unincorporated, non-profit labor organization with approximately 69,000 members who are residents of Virginia, many of whom are users of prescription drugs. Plaintiff-appellee Lynn B. Jordan is a resident of Virginia. She suffers from certain diseases which require her to take prescription drugs on a daily basis. (Stip. 1, 2 & 3; App. 9). Defendants-appellants are the Virginia State Board of Pharmacy and the five individual members of the Board who regulate the practice of pharmacy in Virginia. (Stip. 4 & 5; App. 9-10). In their official capacity, appellants are empowered by section 54-524.22:1 of the Virginia Code to discipline pharmacists who disseminate drug price information in violation of the Virginia statutory prohibition, including the suspension or revocation of a pharmacist's license to practice.

In the court below, appellants, who have had previous experience defending this statute,[7] were given a full opportunity to offer arguments in support of the statute's validity, yet they offered only two justifications for its enactment. After considering all of the evidence offered by appellants, the court rejected the contention that dissemination of drug price information would so demean the profession of pharmacy that public health, safety, and welfare would thereby be endangered. 373 F.Supp. at 687. (JS App. 9).[8] Similarly, the court declined to accept appellants' argument that monitoring justified the statute's interference with appellees' First Amendment rights. *Id.* Indeed, the record contains no evidence whatsoever that monitoring was even considered by the Virginia legislature in passing section 54-524.35(3), let alone that it was the reason for which the statute was enacted. Finding that consumers have a fundamental right to receive drug price information, the court held that section 54-524.35(3) of the Code of Virginia was unconstitutional as a violation of appellees' First Amendment rights and enjoined its enforcement. It is from that order, which has remained in force since March 1974, that this appeal has been taken.

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[7] In *Patterson Drug Co. v. Kingery, supra,* appellants defended the predecessor to the present statute from constitutional attack.

[8] The opinion below is reported as *Virginia Citizens Consumer Council, Inc. v. State Board of Pharmacy,* 373 F.Supp. 683 (E.D.Va. 1974), and is reproduced at pages 1-9 of the Appendix to appellants' Jurisdictional Statement. "JS App." refers to that Appendix.

SUMMARY OF ARGUMENT

Section 54-524.35(3) of the Code of Virginia, which prohibits the dissemination of all prescription drug price information, unconstitutionally denies appellees and the consumers they represent meaningful access to drug price information in violation of their First Amendment rights. Appellants have urged this Court to reverse the decision of a three-judge district court declaring section 54-524.35(3) unconstitutional, arguing that the First Amendment does not protect appellees' right to receive drug price information because that information is "commercial speech" to which the First Amendment does not apply. However, just last term in *Bigelow v. Virginia*, ___ U.S. ___, 43 U.S.L.W. 4734 (June 16, 1975), this Court ruled that this is not the law. While an earlier decision of the Court, *Valentine v. Chrestensen*, 316 U.S. 52 (1942), suggested that First Amendment protection of some "commercial speech" was limited, the holding there was a narrow one which does not control this case. It is now clear, as a result of *Bigelow*, that a State cannot abridge First Amendment rights simply by placing a "commercial" label on the type of speech that it desires to suppress. Because the drug price information sought by appellees does not fall within any of the narrow categories of speech which the Court has found to be unprotected by the First Amendment, the First Amendment applies with full force in the context of this case.

Appellees have an independent First Amendment right to receive drug price information which is not derivative from the rights of speakers to disseminate that information. *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965); *Martin v.*

Struthers, 319 U.S. 141, 143 (1973). The First Amendment protects communications, and a communication is not complete until there has been both dissemination and receipt of information. Therefore, it is necessary to examine the entire context in which information is exchanged to determine the scope of First Amendment protection. Consequently, appellants' contention that this Court cannot recognize appellees' First Amendment rights to receive drug price information because a district court in *Patterson Drug Co. v. Kingery, supra*, refused to recognize pharmacists' rights to disseminate price information is wholly without merit.

Because First Amendment rights are at stake in this action, the Virginia statutory prohibition on drug price advertising can be upheld only if appellants demonstrate that the State had a compelling interest in enacting this legislation. Appellants must show that the actual purposes served by the statute are legitimate purposes, that the statute is the least intrusive means of achieving those purposes, and that on balance, the State's interest in suppressing drug price information outweighs appellees' interest in receiving the information to which the First Amendment entitles them. *See N.A.A.C.P. v. Button*, 371 U.S. 415, 438-39 (1963); *Lamont v. Postmaster General, supra*, 381 U.S. at 307; *Sheldon v. Tucker*, 364 U.S. 479, 488-90 (1960); *Talley v. California*, 362 U.S. 60, 62-64 (1960); *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973). Appellants have made no such showing; rather, they have merely asserted that in some instances a State may regulate health care professions. In support of this proposition, appellants cite four Fourteenth Amendment cases in which this Court upheld state statutes against equal protection and substantive

due process attacks. Those cases are inapposite to the present situation, however, because they are factually distinguishable and because none of them involved First Amendment rights. As a result, in those cases the Court did not apply the strict scrutiny, compelling interest test which must be utilized here, but upheld the statutes after only the minimal scrutiny, rational relationship test utilized in Fourteenth Amendment cases.

Applying the proper strict scrutiny test to the present statute, as the district court did below, results in its invalidation as constitutionally infirm. Appellees have substantial First Amendment interests in receiving drug price information. This information will allow them to make intelligent purchases of the drugs that they need in a market where there are vast variations in retail prices of identical products. In addition, dissemination of price information will revive competition in the retail drug industry, thereby reducing prices to consumers.

Against these benefits, appellants offer only two justifications for the statutory prohibition. They suggest that dissemination of price information will demean the profession of pharmacy and will interfere with those few pharmacists who monitor their customers' drug use. As the district court found, there is no evidence in the record to indicate that price advertising will demean the profession of pharmacy in a way that will adversely affect the public health, safety, or welfare. In addition, there is no evidence to show that monitoring was even considered as a purpose for this statute or that monitoring is necessary for the protection of the public. The record does, however, contain evidence that monitoring is a nonessential and infrequently used practice.

Finally, if monitoring is desirable, Virginia can mandate it legislatively in a manner that does not abridge appellees' First Amendment rights. It is apparent that the only function served by the statute in question is to free pharmacists from price competition at the expense of consumers who have no choice but to pay outrageously high prices for the drugs that their doctors have directed them to take. This does not constitute a legitimate state interest and does not outweigh appellees' First Amendment rights to receive drug price information. Therefore, the Virginia statutory prohibition on the dissemination of drug price information must be overturned as an unconstitutional abrogation of appellees' First Amendment rights.

ARGUMENT

I. COMMUNICATION OF INFORMATION CONCERNING THE PRICE OF PRESCRIPTION DRUGS TO CONSUMERS IS PROTECTED BY THE FIRST AMENDMENT.

The statute under consideration here suppresses both the dissemination and receipt of useful drug price information. It is not disputed that the information which appellees desire to receive is speech. Appellants, however, argue that this speech is entitled to no First Amendment protection because it provides consumers with information that is useful to them in purchasing prescription drugs. As such, appellants label the information "pure commercial speech" and conclude that the First Amendment is thereby rendered inapplicable. (D.Br. 9-10).[9] Appellants

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[9] "D.Br." refers to the brief of defendants-appellants in this Court.

claim that *Valentine v. Chrestensen, supra,* is authority for the total immunization of this statute from First Amendment scrutiny. This is not the case, however, since a number of subsequent decisions of this Court demonstrate that *Chrestensen* does not stand for the all-or-nothing proposition asserted by appellants.

A. The First Amendment Applies To Drug Price Information.

Appellants argue that First Amendment considerations are inapplicable to the present case because appellees desire information that would be disseminated in paid commercial advertisements. Last term in *Bigelow,* however, this Court held a Virginia statute unconstitutional which prohibited the publication or advertising of information relating to abortion services because it violated the First Amendment rights of the publisher of that information and interfered with the interest that the public had in receiving it. Writing for the Court, Mr. Justice Blackmun stated:

> . . . The central assumption made by the Supreme Court of Virginia was that the First Amendment guarantees of speech and press are inapplicable to paid commercial advertisements. Our cases, however, clearly establish that speech is not stripped of First Amendment protection merely because it appears in that form. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relation,* 413 U.S. 376, 384 (1973); *New York Times Co. v. Sullivan,* 376 U.S. 254, 266 (1964).
>
> The fact that the particular advertisement in appellant's newspaper had commercial aspects or

> reflected the advertiser's commercial interests did not negate all First Amendment guarantees. The State was not free of constitutional restraint merely because the advertisement involved sales or "solicitations," *Murdock v. Pennsylvania,* 319 U.S. 105, 110-111 (1943), or because appellant was paid for printing it, *New York Times Co. v. Sullivan,* 376 U.S. at 266, *Smith v. California,* 361 U.S. 147, 150 (1959), or because appellant's motive or the motive of the advertiser may have involved financial gain, *Thomas v. Collins,* 323 U.S. 516, 531 (1945). The existence of "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." *Ginzburg v. United States,* 383 U.S. 463, 474 (1966). [___ U.S. at ___, 43 U.S.L.W. at 4737, slip. op. at 8.]

Appellants' contention that *Chrestensen* must be read broadly enough to remove the instant case from the ambit of First Amendment protection because the dissemination of drug price information merely proposes a commercial transaction is also disposed of by *Bigelow:*

> But the [*Chrestensen*] holding is distinctly a limited one: the ordinance was upheld as a reasonable regulation of the manner in which commercial advertising could be distributed. The fact that it had the effect of banning a particular handbill does not mean that *Chrestensen* is authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge. The case obviously does not support any sweeping proposition that advertising is unprotected *per se.* [footnote omitted].

This Court's cases decided since *Chrestensen* clearly demonstrate as untenable any reading of

that case that would give it so broad an effect. [___ U.S. at ___, 43 U.S.L.W. at 4737, slip op. at 9-10.]

It does not suffice, therefore, to assert that drug price advertising is unprotected speech because it does no more than propose a commercial transaction. In *Bigelow*, the subject advertisements facilitated obtaining abortions by proposing a commercial transaction in which a referral service accepted a fee for making abortion arrangements. An exchange of money accompanied the placement of the advertisement, the referral itself, and the actual abortion. The financial transactions, however, were incidental to the dissemination of useful information concerning health care. As the *Bigelow* opinion states:

> The advertisement published in appellant's newspaper did more than simply propose a commercial transaction. It contained factual material of clear "public interest . . . ."
>
> Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience. [___ U.S. at ___, 43 U.S.L.W. at 4738, slip op. at 11-12.]

This language applies with equal force to the instant case. The drug price information sought by appellees is of "clear public interest" because its dissemination will not only enable comparison shopping but will reduce retail drug prices. Although incidental commercial transactions necessarily accompany the obtaining of prescription drugs, drug price advertising conveys important information about health care needs, and as such, is of "interest and value to a diverse audience." As the three-judge court below noted, 373 F.Supp. at 686,

> the actual suitors are consumers; their concern is fundamentally deeper than a trade consideration. While it touches commerce closely, the overriding worry is the hindrance to a means for preserving health or even saving life.

Where, as here, the desired information is necessary to ease the economic injury inflicted on consumers by Virginia pharmacists, appellees' claim to First Amendment protection has added vitality. As this Court said in *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940):

> Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of the period.

The fact that economic decision-making is involved in this case does not, as appellants argue, eliminate First Amendment concerns, but rather enhances them. *See Dun & Bradstreet v. Grove*, 404 U.S. 898, 905-06 (1971)(Douglas, J., dissenting); *F.T.C. v. Proctor & Gamble Co.*, 388 U.S. 568, 603-04 (1967)(Harlan, J., concurring); *P.A.M. News Corp. v. Butz*, 514 F.2d 272, 277 (D.C. Cir. 1975).

Several lower courts have also considered the scope of First Amendment protection in a commercial context and have held that the First Amendment continues to protect the rights of those who would disseminate and receive commercial information. *See, e.g., Hiett v. United States*, 415 F.2d 664 (5th Cir. 1969), *cert. denied*, 397 U.S. 936 (1970); *Terry v. California State Board of Pharmacy, supra; Associated Students for the University of California at Riverside v. Attorney General*, 368 F.Supp. 11 (C.D.Cal. 1973) (three-

judge court); *Atlanta Coop. News Project v. U.S. Postal Service*, 350 F.Supp. 234 (N.D.Ga. 1972)(three-judge court). A recent decision by a three-judge court for the Southern District of New York in *Population Services International v. Wilson*, ___ F.Supp. ___ . No. 74 Civ. 1572, slip op. at 41 (July 2, 1975), invalidated a state statute which prohibited anyone but a licensed pharmacist from advertising contraceptives. The court there relied on *Bigelow* in holding that the statute offended the First Amendment, even though commercial advertising was at issue.

The incidental commercial context in which drug price advertising occurs does not eliminate the protection offered by the First Amendment. Nor does the information which appellees desire fall into any of the narrow categories of speech which have been held to be unprotected by the First Amendment, such as fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); obscenity, *Roth v. United States*, 354 U.S. 476, 481-485 (1957); *Miller v. California*, 413 U.S. 15, 23 (1973); libel, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); or incitement, *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *See Bigelow v. Virginia, supra*, ___ U.S. at ___, 43 U.S.L.W. at 4737, slip op. at 8-9. Consequently, the First Amendment protects the drug price information which appellees desire to receive.

B. Appellees Have a Right to Receive Drug Price Information.

Since the First Amendment applies to drug price information, appellees and the consumers they represent have a right to receive that information. As even appellants concede, the First Amendment is intended to foster communication,

and communication requires both the dissemination and receipt of information. (D.Br. 17). The right to receive information has, therefore, been recognized by this Court as necessary to the proper functioning of the First Amendment. *Kleindienst v. Mandel, supra*, 408 U.S. at 762-63; *Stanley v. Georgia, supra*, 394 U.S. at 564; *Lamont v. Postmaster General, supra*, 381 U.S. at 307; *Martin v. Struthers, supra*, 319 U.S. at 143. As Mr. Justice Brennan said, concurring in *Lamont v. Postmaster General, supra*, 381 U.S. at 308, "[i]t would be a barren marketplace of ideas that had only sellers and no buyers."

Appellants argue, however, that the decision of a three-judge district court for the Western District of Virginia in *Patterson Drug Co. v. Kingery, supra*, forecloses this Court from recognizing any First Amendment right that appellees have to receive drug price information. (D.Br. 12ff.). *Patterson* upheld the constitutionality of the predecessor to the statute here under consideration in an action brought by a pharmacist and a drug company on Fourteenth Amendment, due process grounds.[10] Relying on that decision, appellants argue that consumers have no right to receive drug price information because pharmacists can be prevented from disseminating such information. Appellees' First Amendment rights to receive drug price information, however, are not derivative rights. They are independent rights which cannot be nullified by a district court's substantive due process decision. In *Kleindienst v. Mandel, supra*, 408 U.S. at 762-63, this Court recognized the rights of college professors

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[10] One sentence in the *Patterson* opinion was devoted to the plaintiffs' First Amendment claim. While the court rejected that claim, it never considered First Amendment rights that consumers have to receive drug price information. *See* 305 F.Supp. at 825.

to receive information from a non-resident alien while making it clear that the alien himself did not have constitutional rights which required protection. This directly undercuts appellants' contention that the right to receive information can never be broader than the right to disseminate it. (D.Br. 16).

It must also be emphasized that appellees' First Amendment rights to receive drug price information through advertisements cannot be abridged by arguing that alternative methods exist for obtaining this needed information. Again, *Kleindienst v. Mandel* is instructive in its emphatic rejection of this argument in a context where the right to know could have been exercised by reading books and making telephone calls. 408 U.S. at 765.[11] There, only face-to-face exchanges of information were prevented, but this Court was unwilling to find that the many available alternatives were sufficient to dispose of the plaintiffs' First Amendment claims. *Id.* In the situation presently before the Court, no adequate alternatives exist for obtaining drug price information. Publications are totally unavailable, and telephone calls are frequently useless. As a result, it may often be necessary to undertake the extreme inconvenience of personally visiting many pharmacies in order to obtain comparative price information, an exercise in which the old and immobile cannot engage. (*See* Stip. 25 & 27; App. 15).

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[11] *See also Terry v. California State Board of Pharmacy, supra,* slip op. at 12, where a three-judge district court for the Northern District of California held a statute similar to that here under consideration unconstitutional because it denied consumers the right to receive drug price information even though pharmacists in California are required by law to post the prices of the 100 most frequently used drugs and to answer all oral and written requests for drug prices.

While appellees have a strong interest in receiving drug price information, the interest of the State of Virginia in continuing to conceal this information is questionable. Where First Amendment rights are involved, as they are here, the competing interests of the individual and the state must be balanced, and state regulation can be sustained only where the state's interest proves to be the more substantial. Appellants have attempted to avoid such a balancing of interests by applying the label "commercial speech" to drug price information and arguing that the First Amendment does not apply. This Court has explicitly rejected such an evasive approach to the First Amendment, however.

> The Court has stated that "a State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button,* 371 U.S. at 429. Regardless of the particular label asserted by the State – whether it calls speech "commercial" or "commercial advertising" or "solicitation" – a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation. [*Bigelow, supra,* ___ U.S. at ___, 43 U.S.L.W. at 4739, slip op. at 16.]

Inquiry must, therefore, be made into the justification for section 54-524.35(3) of the Virginia Code to see if it bears a sufficient relationship to the health and safety of Virginia residents, to withstand appellees' First Amendment challenge.

II. APPELLEES' SUBSTANTIAL INTEREST IN OBTAINING DRUG PRICE INFORMATION GREATLY OUTWEIGHS ANY INTEREST THAT THE STATE MAY HAVE IN SUPPRESSING THAT INFORMATION.

Having concluded that the First Amendment protects appellees' rights to receive drug price information, the Court must balance appellees' First Amendment interests against the State's asserted interest in preventing the dissemination of drug price information in order to determine the statute's constitutionality. Because First Amendment rights are involved, the State must satisfy a two-part test. If the statute is to be upheld, the State must first show that it has a compelling interest in achieving some legitimate end sought to be advanced by the statute. *N.A.A.C.P. v. Button, supra,* 371 U.S. at 438-39; *Lamont v. Postmaster General, supra,* 381 U.S. at 308-09 (Brennan, J., concurring). *See Dunn v. Blumstein, supra,* 405 U.S. at 342-43. Secondly, the state must show that the statute is drawn as narrowly as possible and that no less restrictive means of regulation will suffice. *N.A.A.C.P. v. Button, supra,* 371 U.S. at 438-39; *Sheldon v. Tucker, supra,* 364 U.S. at 488-90; *Talley v. California, supra,* 362 U.S. at 62-64; *Dunn v. Blumstein, supra,* 405 U.S. at 343; *Broadrick v. Oklahoma, supra,* 413 U.S. at 611-12. Only if these two conditions are satisfied, and the interest of Virginia in concealing drug price information is found to outweigh appellees' First Amendment interests in receiving that information, can the statute be upheld.[12]

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[12] The Court is not required to determine whether the public's interest in receiving drug price information is as important as the (continued)

This Court has never held that where the First Amendment applies, the compelling state interest test is any less applicable merely because protected speech occurs in a commercial context. However, even if the Court were to fashion a new doctrine under which commercial speech could be regulated upon a showing of less than a compelling state interest, under the facts of this case, the statute in question could still not be sustained. The First Amendment contains perhaps the most fundamental of the individual rights secured by the Constitution. Consequently, any state legislation which interferes with the exercise of First Amendment rights must at the very least be viewed with a healthy skepticism. In addition, the less compelling a particular state interest becomes, the greater the need for insuring that the legislation is the least intrusive method of regulation possible.

The Court need not dwell upon the precise state interest necessary to withstand First Amendment attack because this case is similar to *Bigelow* where the statute under review bore so little relation to a legitimate state purpose that the Court invalidated it without even discussing the precise test which it was applying. The *Bigelow* opinion did state that at the very least there must be "a clear relationship between the advertising in question and an activity that the government was legitimately regulating." ___ U.S.

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[12] (continued)
public's interest in receiving information that is of philosophical, political, moral or aesthetic value. All of these interests are protected by the First Amendment, but the only balancing that is required here is the balancing of appellees' interest in receiving drug price information against any legitimate interest that the State may have in limiting access to it.

at ___ n.10, 43 U.S.L.W. at 4739 n.10, slip op. at 15 n.10. Such a relationship is not present here, however. While Virginia certainly has an interest in protecting the health and welfare of users of prescription drugs, that interest is not advanced by the statute under consideration. In fact, the relationship between the present statute and any legitimate interest of the State of Virginia is so attenuated that it is doubtful that the statute could withstand even the minimal scrutiny required in Fourteenth Amendment substantive due process cases under this Court's decision in *North Dakota Pharmacy Board v. Snyder's Stores, Inc.*, 414 U.S. 156 (1973), and the other due process decisions on which appellants rely in this First Amendment case. (*See* D.Br. 10-11).[13]

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[13] In addition to *North Dakota Pharmacy Board*, appellants cite *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608 (1935), *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955), and *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969), for the proposition that this statute must be sustained if it bears any rational relationship to a legitimate state end. Appellees do not believe that the statute meets even a rational relationship test, but in any event, that is not the test to be applied. This is a First Amendment case, involving fundamental guarantees secured by the Bill of Rights, not a Fourteenth Amendment case where states are allowed great latitude in enacting regulatory schemes designed to protect their citizens.

Neither *North Dakota Pharmacy Board*, *Semler*, nor *Williamson* was brought by individuals who sought to receive vital information. In addition, the mode of regulation in each of those cases at least arguably bore some relationship to a legitimate end which the state was actually trying to attain. In *McDonald* the Court sustained against Fourteenth Amendment equal protection attack, a statute which did not authorize receipt of absentee ballots by prison inmates awaiting trial. The Court ruled, however, that because

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A. Appellees And All Other Consumers Have A Significant Need For Drug Price Information.

Appellees' interest in receiving drug price information is substantial. If drug prices were advertised in Virginia, appellees and all other prescription drug consumers would be able to make reasoned choices about where to make their needed purchases. In addition, special programs, such as those offering discounts to senior citizens who are frequently on fixed incomes and who have expensive drug needs, would be more effective and better utilized because more consumers would know about them.[14]

More importantly, however, the effective dissemination of drug price information would revive competition in Virginia and thereby reduce the price of prescription drugs. Not only would this significantly benefit each consumer in the State, but competition would benefit the public generally by implementing "sound economic and social policy."[15] Expenditures of both federal and state governments on prescription drugs through Medicare and Medicaid programs would also be reduced as a result of drug price disclosure. Finally, prescription drug prices would

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[13] (continued)
the record failed to show that petitioners were prevented from voting by the operation of the statute, as opposed to some other causes, only the rational relationship test, rather than the compelling interest test required in First Amendment cases, had to be met. 394 U.S. at 807-08

[14] *See* testimony of Myron D. Winkelman, paragraph 5. (App. 50).

[15] *Research Paper and Policy Statement of the United States Department of Justice Regarding State Restrictions on the Advertising of Retail Prescription Drugs.* (App. 23).

more accurately reflect the value of the retail items being purchased. Pharmacists in Virginia would no longer be able to mask high mark-ups that are unrelated to costs or to the provision of any service. If drug price information were available, consumers would have a better understanding of how much they were paying for drugs and how much extra they were paying as charges for services which they may not have requested and may not even desire. This would then enable a determination by each consumer of whether the services received were worth the prices charged for them. All of these considerations weigh heavily against the constitutionality of the Virginia statute.

The need for drug price information can be better appreciated once it is recognized how vast a role prescription drugs play in our economy. In 1970 prescription drug expenditures by Americans totaled more than $9 billion. (Stip. 17; App. 12). In this context, prescription drug price differentials which have been documented to be as high as 1200% are plainly significant. (Stip. 22(d); App. 14). Pharmacists vastly increase their profits in both percentage terms and in absolute dollars by insulating themselves from competition, while consumers suffer equally vast economic injuries which they are helpless to prevent.

Appellees have recognized and tried to end the hardship caused by the unavailability of objective drug price information, as have agencies of the federal government who are charged with protecting the very consumer interests that the Virginia statute frustrates. (*See* App. 21-27). Even the court in *Patterson Drug Co. v. Kingery, supra,* the case on which appellants so heavily rely, recognized that the anticompetitive situation existing in Virginia was

created by organized pharmacists for their own monetary benefit at the expense of consumers. 350 F.Supp. at 825. The interest of appellees, shared by all members of the public, in terminating the concealment of drug price information requires great deference, and, as we demonstrate below, no interest of the State of Virginia in suppressing this information is sufficient to offset it.

B. The State Of Virginia Has No Legitimate Interest In Prohibiting The Dissemination Of Drug Price Information.

Appellants have cited two purposes to be served by Virginia's statutory prohibition on drug price advertising. First, they contend that the statute protects the public health, safety, and welfare by regulating the profession of pharmacy. Second, appellants argue that the statute aids those few pharmacists who monitor their customers' drug use by discouraging them from shopping at other pharmacies. The statute, however, bears very little relationship to either of these purposes. Moreover, to the extent that these are desirable objectives, they can be more directly and effectively achieved by other types of legislation which do not deny consumers their right to receive valuable drug price information.

1. The Professional Nature Of Pharmacy Does Not Justify the Statute Under Review.

In asserting that the practice of pharmacy is a "profession," appellants again seek to invoke a magic word that can uphold the validity of the Virginia statute without the

need to balance the interests involved.[16] As Mr. Justice Brennan stated, however:

> The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms. Thus it is no answer to the constitutional claims asserted by petitioner to say, as the Virginia Supreme Court of Appeals has said, that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. [*N.A.A.C.P. v. Button, supra,* 371 U.S. at 438-39.]

In a further attempt to avoid meaningful balancing, appellants, who purport to recognize that this is a First Amendment case (D.Br. 4), rely on a series of substantive due process decisions in support of their argument that this Court may begin and end its inquiry simply by recognizing that under some circumstances, a state may regulate health professions. (D.Br. 4-7).[17] Appellants would have the Court sustain this statute if it bore no more than a rational relationship to a legitimate state end, despite the fact that First Amendment rights are at stake. Even under appellants' application of the Fourteenth Amendment minimal scrutiny test, however, it does not suffice to merely invoke the term "professional." The days in which professionalism was synonymous with freedom

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16 *See* page 21, *supra.*

17 As is noted above at page 24 n. 13, these Fourteenth Amendment cases do not control the present case.

from competition appear to be gone. *See Goldfarb v. Virginia State Bar,* ___ U.S. ___ , 43 U.S.L.W. 4723 (June 16, 1975).

Appellants emphasize that pharmacists receive special training and are licensed just as other professionals are. These facts, however, do not support the present statute because appellants never demonstrate any connection between the professional nature of pharmacy and the dissemination of drug price information. Selling prescription drugs in this country is a $9.14 billion a year retail industry. (Stip. 17; App. 12). While a small number of drugs are compounded by pharmacists, 95% of all prescriptions are filled by selling pre-manufactured dosage forms of prescribed drugs. (Stip. 18; App. 13).[18] Although pharmacists provide services to their customers, this does not change the nature of the retail sale. As the Treasury Department noted in requiring pharmacists to post base prices of prescription drugs as required by the Economic Stabilization Act:

> The dispensing of prescription drugs is considered to be a retail activity, and therefore, it is covered by Price Commission regulations requiring that base prices be posted. The fact that a professional pharmacist is employed to dispense drugs is incidental to the sale of those drugs and does not alter the retail nature of the transaction . . . .
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> The requirement that pharmacists post base prices is in no way inconsistent with their recog-

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18 Other estimates of the percentage of drugs sold in pre-manufactured form are as high as 99%. *See* testimony of Myron D. Winkelman, paragraph 2. (App. 49).

nized professional standing, but is considered by the Price Commission to be necessary to achievement of stabilization objectives. (Stip. 19; App. 13).[19]

It is difficult to imagine any way that the dissemination of drug prices will demean the profession of pharmacy and thereby harm the public health, safety, or welfare. Drug price advertising is not promotional since prescription drugs can be obtained only after a licensed physician determines that they are necessary. Consequently, the State here has even less justification for enacting its prohibition than it did in *Bigelow* where this Court rejected the argument that Virginia had a sufficient interest in seeing that women who were considering abortions were not coerced into them by a referral agency. ___ U.S. at ___, 43 U.S.L.W. at 4741, slip op. at 4 (Rehnquist, J., dissenting).

There is also little danger that consumers will be victimized by false or deceptive advertising. We are not here talking about "puffing" or self-aggrandizement, but about price and discount information that is capable of objective verification. In addition, Virginia has already taken direct steps to eliminate deceptive advertising. Section 59.1-44 of the Virginia Code (1975 Supp.) prohibits "untrue, deceptive or misleading" advertisements of any type, and section 54-524.35(2) (1974) specifically prohibits a pharmacist from making statements "about his professional service which have a tendency to deceive or defraud the public, contrary to the public health and

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[19] *See also* testimony of Myron D. Winkelman, paragraphs 2 & 4. (App. 49-50).

welfare." The First Amendment does not preclude Virginia from preventing deceptive advertising, but if that is the objective, the State must rely on its legislation directed specifically at that problem. As this Court stated recently in *Erznonik v. City of Jacksonville,* "[w]hen First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity of purpose are essential." ___ U.S. ___, ___, 43 U.S.L.W. 4809, 4813 (June 23, 1975).

There is no danger that reduced prices or special discounts will cause consumers to purchase excessive quantities of drugs that will become ineffective before they can be used. Few physicians could be persuaded to prescribe too large a quantity of drugs simply to allow a patient to take advantage of a bargain or quantity discount, and few patients would want to waste money on drugs they did not need. (Stip. 45; App. 19). Likewise, the statute cannot be justified by asserting that price competition will cause pharmacists to buy in bulk, thereby leaving drugs to sit on the shelf while they lose their potency. It would be unethical, unprofessional, and illegal for a pharmacist to dispense a drug which was adulterated or which had become dangerous or ineffective because of age or condition of storage. (Stip. 50; App. 21). The suggestion that prohibiting the dissemination of drug price information is a restraint on the behavior of professionals that is necessary to protect the public health, safety, and welfare is wholly without merit.[20]

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[20] Appellants have tried to create the impression that by striking down the statute presently under review, the Court will be forced to invalidate state prohibitions on advertising by doctors, lawyers, and other professionals. (D.Br. 17). We agree with

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2. Monitoring Does Not Justify The Statute Under Review.

Appellants' contention that the statute is necessary to allow effective drug monitoring is equally specious. Monitoring is the practice of keeping a record of the drugs purchased by customers. This practice can benefit customers by allowing pharmacists to detect the use of antagonistic drugs, but can also benefit the pharmacists by providing them with a direct mailing list to aid in advertising their non-prescription products, and by cutting paperwork for billing, insurance, and tax purposes. (Stip. 30-32; App. 16-17).

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20 (continued)
defendants that an affirmance of the decision below will mean that state-enforced prohibitions on advertising by professionals will be subject to the same kind of First Amendment scrutiny which is being undertaken in this case. That does not mean, however, that any – let alone all – such prohibitions will automatically be stricken down. The result in each case will depend upon several factors including: the nature of the information being disseminated (what is the public's interest in receiving such information, and is the information factual or primarily self-laudatory); the nature of the state interest asserted to support the prohibition (is the interest compelling or very weak); and the alternative means available to the state to achieve its purpose (how restrictive is the prohibition and what alternative means of regulation are available). These questions can only be answered in the context of a particular case after the parties have had an opportunity, as they did here, to establish the relevant facts on the record. Accordingly, an affirmance of the decision below will provide only the mode of analysis, not the result, with respect to future actions involving other statutes limiting the dissemination of other types of information.

Despite these potential benefits, many pharmacists do not monitor their customers' drug use.[21] There appear to be several reasons for this. First, because it is the physician's responsibility to see that patients do not take antagonistic drugs, the failure of pharmacists to monitor does not endanger the health of customers. (Stip. 35 & 36; App. 17).[22] Second, monitoring is likely to be ineffective because prescription drugs can be antagonistic to non-prescription drugs, and to foods and drinks which are not included on prescription records by those pharmacists who do monitor. (Stip. 33 & 34; App. 16-17). In addition, many people patronize more than one pharmacy because of convenience and other factors, thereby making it difficult for a pharmacist to keep comprehensive drug-use records. (Stip. 40; App. 18). Also, the effectiveness of monitoring is reduced because many people move without taking their prescription records with them. (Stip. 37-39; App. 17-18). The fact that many pharmacists do not monitor their customers' drug use, combined with the fact that people already patronize many different pharmacies, reveals that the protection of monitoring does not justify

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21 In *Patterson Drug Co. v. Kingery, supra,* the court recognized that only a minority of pharmacists monitor customers' drug use. 350 F.Supp. at 824. In addition, on page 3 of appellants' Opening Brief On The Merits in the district court, appellants themselves cited statistics showing that in Northern Virginia only 9 of 129, or 7% of the pharmacists surveyed, monitored drug use, and even in Richmond, Virginia, only 38% of the pharmacists did so. See also *Pennsylvania Board of Pharmacy v. Pastor,* 441 Pa. 186, 197, 272 A.2d 487, 493 (1971), where the court found monitoring to be "infrequent" and "not completely effective."

22 *See also* testimony of Dr. Sidney Wolfe, paragraphs 1 & 2, (App. 51), and testimony of Myron D. Winkelman, paragraph 3. (App. 49).

a statutory prohibition on the dissemination of drug price information merely because consumers might change pharmacies once they are given comparative price information.[23]

It is clear that appellants' reliance on monitoring to support the statute is a mere rationalization rather than a justification. There is not a shred of evidence in the

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23 Several state courts have emphatically rejected the monitoring justification in striking down statutes such as the one here at issue as violative of state Constitutions. For example, in *Pennsylvania Board of Pharmacy v. Pastor, supra*, 441 Pa. at 196-197, 272 A.2d at 493, the Pennsylvania Supreme Court invalidated a price advertising prohibition on dangerous or narcotic drugs in spite of the offered monitoring justification. Moreover, in *Florida Board of Pharmacy v. Webb's City, Inc.*, 219 So.2d 681 (Fla. 1969) and *Stadnik v. Shell's City, Inc.*, 140 So.2d 871 (Fla. 1962) a similar Florida statute was invalidated. *But see Supermarkets Gen. Corp. v. Sills*, 98 N.J. Super. 326, 225 A.2d 728 (1966).

In striking down a Maryland drug price prohibition statute, the Court of Appeals of Maryland also rejected the monitoring argument, stating:

> Similarly, here no evidence was produced "to indicate the extent, if any to which pharmacists monitor prescriptions." We strongly suspect that monitoring, which may have been common in the past, hardly exists today. The President of the Board disclosed unfamiliarity with this term when first asked to define it. Given the diversification of modern retailing practices and the mobility of our society, it is quite likely that the physician is better able to monitor the possible ingestion of antagonistic drugs than the pharmacist. Therefore, in this context, we too are unpersuaded that the legislative means employed have a "real or substantial relation" to the objects for which they are allegedly designed. *Maryland Board of Pharmacy v. Sav-A-Lot, Inc.*, 270 Md. 103, 112, 311 A.2d 242, 247 (1973).

record indicating that the Virginia legislature even knew what monitoring was when it enacted section 54-524.35(3) of the Virginia Code.[24] Appellants claim that the indirect encouragement of monitoring is so important that it outweighs appellees' First Amendment rights. However, nowhere in the Codes of Ethics of the American Pharmaceutical Association or the Virginia Pharmaceutical Association, or in the appellants' regulations is there any requirement that pharmacists maintain customer prescription records. Although the Virginia Pharmaceutical Association actively lobbied for the Virginia ban on drug price advertising, neither it nor the State Board of Pharmacy has ever urged legislation that would require monitoring. (Stip. 42-44 & 49; App. 18-20). To uphold this statute as a legitimate effort to encourage monitoring would be to make a mockery of the First Amendment. If Virginia truly wishes to encourage monitoring by its pharmacists, it must do so with legislation reasonably related to that end which does not ignore the First Amendment rights of consumers to receive drug price information.

C. There Is No Other Justification For The Statute Under Review.

There is no meaningful relationship between the prohibition of prescription drug price advertising in Virginia and the suggested justifications for the statute offered by

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24 This distinguishes the present case from cases like *Weinberger v. Salfi*, ___ U.S. ___, 43 U.S.L.W. 4985, 4993-96 (June 26, 1975), and *Weinberger v. Wiesenfeld*, ___ U.S. ___, 95 S.Ct. 1225, 1233-36 (1975), where there was clear legislative history that established that Congress' purposes were in fact those being offered to sustain the statutes under review.

appellants. In addition, none of the circumstances which have caused this Court to uphold the regulation of commercial speech in other contexts applies here. For example, in *Pittsburgh Press Co. v. The Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), and in *United States v. Hunter*, 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972), regulation of speech was upheld because it fostered activities which the government had prohibited. In *Pittsburgh Press*, the ordinance being reviewed prohibited sex classification in newspaper want-ads as part of a legislative program that made it illegal to discriminate on the basis of sex in employment. Likewise, in *Hunter*, racial classifications in newspaper advertisements offering apartment rentals were prohibited because the underlying activity – racial discrimination in housing – was illegal. Here, however, the underlying activity is the purchase of prescription drugs by patients who have been told to use those drugs by their physicians. This activity is certainly not illegal, and the State cannot legitimately discourage consumers from making purchases upon the advice of a licensed physician.

Appellants have not contended that the State could totally prevent the dissemination of drug price information to consumers so that drug prices would not be revealed until after a sale was consummated. Appellants' position is that while consumers have a right to receive drug price information, the State can legitimately make access to it difficult and inconvenient. If, as all parties agree, consumers have a right to know the prices of the drugs that they purchase, there is no reason for making accurate price information difficult to obtain. This would make sense only if the State desired to discourage consumers from purchasing the drugs prescribed for them, an intent

which, presumably, was not that of the Virginia legislature.

The present case also differs from the situation presented in cases such as *New York State Broadcasters Ass'n. v. United States*, 414 F.2d 990 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970); *Capital Broadcasting Co. v. Acting Attorney General*, 333 F.Supp. 582 (D.D.C. 1971)(three-judge court), *aff'd*, 405 U.S. 1000 (1972); and *Banzhaf v. F.C.C.*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied sub nom., Tobacco Institute, Inc. v. F.C.C.*, 396 U.S. 842 (1969). Appellants argue that these cases authorize the State to discourage the dissemination of price information even though the underlying activity of purchasing drugs is legal. (D.Br. 12). Each of these cases, however, involved regulation of the electronic media, where one must be licensed to use the airwaves that are owned by the public. *Capital Broadcasting, supra*, 333 F.Supp. at 586. These cases simply recognize that "[t]he unique characteristics of electronic communication make it especially subject to regulation in the public interest." *Id.* at 584. *See also Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 386-90 (1969); *National Broadcasting Co. v. United States*, 319 U.S. 190, 216-20, 226-27 (1943). *Compare Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

Moreover, in *Capital Broadcasting* and *Banzhaf*, the federal government sought to protect the public health by reducing smoking. To achieve that end, the government tried to eliminate the pervasive incentive to smoke created by radio and television advertising. Those cases stand for the proposition that it is constitutional to attempt to discourage smoking by regulating cigarette advertising, without prohibiting smoking altogether, because smoking is a recognized detriment to the public health which the government

need not attempt to eradicate completely. *See Williamson v. Lee Optical of Oklahoma, Inc., supra,* 348 U.S. at 487-88. Likewise, in *New York State Broadcasters Ass'n. v. United States,* Congress prohibited use of publicly owned airwaves for advertising which promoted lotteries. Congress viewed gambling as undesirable and tried to discourage it by foreclosing use of federally regulated media for the promotion of lotteries.[25] Here, however, use of prescription drugs under a doctor's direction is not even arguably a detriment to the public health or welfare, and Virginia has never sought to discourage prescription drug purchases. Therefore, the State cannot justify a prohibition on drug price advertising by asserting any interest in discouraging the purchase of prescription drugs.

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[25] While the Second Circuit in *New York State Broadcasters* upheld the prohibition on using the electronic communications media to promote lotteries, the Third Circuit, in a unanimous *en banc* decision in *New Jersey State Lottery Comm. v. United States,* 491 F.2d 219 (1974), held the prohibition to be unconstitutional as a violation of the First Amendment. Although this Court granted certiorari in the New Jersey case to resolve the apparent conflict between Circuits, *United States v. New Jersey State Lottery Comm.*, 417 U.S. 907 (1974), that case was remanded to consider whether a change in the statutory prohibition to allow some promotion of state sponsored lotteries rendered the case moot. *United States v. New Jersey State Lottery Comm.*, ___ U.S. ___ , 95 S.Ct. 941 (1975). On July 14, 1975, the Third Circuit in an *en banc,* per curiam opinion held that the action was not moot in light of the statutory change. *New Jersey State Lottery Comm. v. United States,* ___ F.2d ___, (No. 72-1878).

CONCLUSION

Appellees and all other consumers have a pressing need for drug price information and have a First Amendment right to receive that information in a useful form. Access to drug price information will enable each consumer to shop for low prices and will benefit the public generally by reviving economic competition in the multi-billion dollar retail drug industry, thereby lowering retail drug prices. The only purpose served by the statute under review is the suppression of such competition. This is not a legitimate state interest and does not outweigh appellees' First Amendment interests. Appellants offer no plausible justifications for the statute which even begin to approach the compelling state interest that is necessary to override appellees' First Amendment rights. All of the relevant considerations point to the same conclusion; section 54-524.35(3) of the Virginia Code must be invalidated as offensive to the First Amendment of the Constitution.

Respectfully submitted,

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July 31, 1975